84-444

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19

Office - Supreme Court, U.S.
FILED
SEP 18 1984
ALEXANDER L. STEVAS
CLERK

CHARLES J. CONNOR;
THOMAS VITAL;
FREDERICK STOWELL, JR.;
PAUL DUBOIS;
STEPHEN BOZA;
ROBERT SAKWA;
ANTONE FARIAS, JR.;
RICHARD J. PERZENTZ;
SCOTT FRYER; and
MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, INC.
Petitioners

vs.

AEROVOX INCORPORATED; and
CORNELL-DUBILIER ELECTRIC
CORPORATION
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Did Congress, by enacting the Federal Water Pollution Control Act Amendments of 1972, and the Marine Protection, Research and Sanctuaries Act, preempt and bar all non-statutory maritime tort causes of action by private victims against all private polluters for damages caused by marine pollution?

(2) Does the holding of the First Circuit that "federal common law of nuisance in the area of water pollution" is to be read as being synonymous with "all federal judge-made law of nuisance whether maritime or general federal law" destroy the distinctions between federal common law and federal maritime law set forth in Article III, Section 2, of the Constitution, and in 28 U.S.C. 1331 and 1333?

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OPINIONS DELIVERED BELOW

At this time, the petitioners have been unable to find any formal publication of the opinion of the district court below, and have also been unable to find any formal publication of the opinion below of the court of appeals for the first circuit. Petitioners have made a Westlaw electronic search of cases in the district court of Massachusetts and in the court of appeals for the first circuit, as well as a manual search of American Maritime Cases, to no avail.

GROUNDS FOR JURISDICTION

The original cause of action in the U.S. District Court for the District of Massachusetts was dismissed on 1 February 1983. The judgment of the U.S. Court of Appeals for the First Circuit was entered on 28 March 1984. A timely petition for rehearing was denied on 25 April 1984. A motion to this Honorable Court for leave to file the within petition on or before 22 September 1984 was allowed on 13 July 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONSTITUTION, ARTICLE III, Sec. 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Title 28, U.S. Code, Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Title 28, U.S. Code, Section 1333

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Federal Water Pollution Control Act
Title 33, U.S. Code, Section 1251 et seq.

Marine Protection, Research and Sanctuaries Act.
Title 33, U.S. Code, Section 1401 et seq.

STATEMENT OF THE CASE

The trial court, on motion, dismissed the complaint for failure to state a cause of action for which relief could be granted. Therefore, this statement is based upon a reading of the complaint most favorably to plaintiff-petitioners.

Petitioners-plaintiffs (hereinafter plaintiffs) are fishermen, licensed by Massachusetts to engage in a restricted commercial lobster fishery, and the Massachusetts Lobstermen's Association, Inc., whose members comprise most of the commercial lobstermen licensed by the Commonwealth of Massachusetts. A class action was also alleged, including within the class all commercial lobstermen, shellfishermen and finfishermen in the area of the pollution complained of.

In the course of manufacturing operations conducted continuously over a period of years, the two defendants-respondents

(hereinafter defendants) Aerovox, Inc., a Massachusetts corporation, and Cornell-Dubilier Electric Corp., a Delaware corporation, discharged and dumped into the waters of the Acushnet River, New Bedford Harbor and Buzzard's Bay, Massachusetts, substantial quantities of toxic chemicals and other pollutants, including a class of organic chemicals characterized by molecular configuration as polychlorinated biphenyls (hereinafter referred to as PCBs).

Consumption of foods, including fish and shellfish, containing measurable amounts of PCBs is regulated by the Federal Food Drug Administration (FDA) pursuant to 21 U.S.C. Sections 301 and 346, and by the Massachusetts Department of Public Health (MDPH) pursuant to Chapter 105 of the Code of Massachusetts Regulations and by 105 CMR 260.001 et seq., in particular.

PCBs are highly stable compounds which do not degrade quickly. They settle to the

seabed of the body of water into which they are discharged, becoming incorporated into the bottom sediments, where they remain for decades without breaking down into less harmful products. PCBs are ingested by lobsters, shellfish, bottom feeding fish and other filter-feeding benthyic organisms, which accumulate the chemical in their organs and tissue in concentrations in excess of tolerance levels established by the FDA and the MDPH. Lobsters, shellfish and various bottom-feeding finfish with high concentrations of PCBs in their flesh are banned by both the FDA and MDPH as food for human consumption, and therefore they may not legally be sold by plaintiffs.

The PCBs discharged and dumped by the defendants into the aforementioned waters have become permanently fixed in the seabed of those waters, where they have contaminated the lobsters, shellfish and bottom-feeding fish in the area. As a result, the MDPH first closed the waters

north of the Hurricane Dike in New Bedford Harbor (Area I) to the taking of lobsters and shellfish; then closed the waters generally south of Area I and north of a line extending from Ricketson's Point in South Dartmouth westerly to Wilbur Point on Sconticut Neck (Area II) to the taking of lobster or bottom-feeding fish (including eels, scup, flounder and tautog); and thereafter similarly closed the waters generally south of Area II and north of a line extending from Mishaum Point on Smith Neck in the Town of Dartmouth north and west to Gong "3" on Hursett Rock off New Bedford Harbor and contiguous north and east to Rocky Point and West Island in the Town of Fairhaven (Area III). All of the closed areas are in Massachusetts. [For a sketch showing these areas, see Appendix at A33, below.]

Because of the closings of said areas to lobstering and other fishing engaged in by the individual plaintiffs, they and other

commercial fishermen have been forced to fish elsewhere. Those closed areas are the best and most accessible areas for lobstering, finfishing and shellfishing, and are where plaintiffs habitually conducted their commercial lobstering, shellfishing and finfishing activities in the past. With each new closure, the plaintiffs have been forced to travel further from port on each fishing trip, have been forced to fish in distant areas which are more treacherous by reason of weather and sea conditions, and have been subjected to greater stress on themselves, their boats and equipment than they were required to sustain before the closure of the more sheltered waters of Areas I, II and III. Moreover, since the closures, they have been unable to carry on lobstering, shellfishing and finfishing operations with the same frequency and regularity as in the past, because of the more severe and prohibitive weather and sea conditions in the areas outside of Areas I,

II and III. Because plaintiffs have also been unable to service their lobster pots or fish traps as frequently because of the greater distances from port, they have lost gear to thieves and to the perils of the sea more than in the past. As a result, plaintiffs have had a substantial increase in their costs and expenses of operations, including much higher fuel costs, and have not been able to take lobsters, shellfish and finfish with the same quantitative or financial success as they had when operating in the safer, but now closed areas, and have suffered great emotional stress and injuries because of the greater risks and conditions faced, all to their great damage.

The plaintiff Massachusetts Lobstermen's Association, Inc. (hereinafter MLA), which maintains a hull insurance program for its members, has faced greater financial risks by reason of the increased likelihood of claims against its insurance policies byplaintiffs and other of its covered

members who previously fished primarily in the safer waters that are now closed to them.

Because of the state of current scientific and engineering knowledge, there is no practical means to clean up Areas I, II and III to remove the toxic chemicals and other pollutants, including PCBs, so that they may be reopened and plaintiffs may go back to commercial fishing there within the foreseeable future. Their injuries are thus permanent.

On 31 December 1980, plaintiffs filed suit in the United States District Court for the District of Massachusetts against Aerovox, Inc. and Cornell-Dubilier Electric Corp. The action was grounded in maritime tort allegations and was filed within the admiralty and maritime subject matter jurisdiction of the district court. Jurisdiction was invoked pursuant to Article III, Section 2 of the United States

Constitution and 28 U.S.C. 1333. Plaintiffs also claimed a class action under Fed. R. Civ. P. Rule 23, on behalf of all other lobstermen, shellfishermen and finfishermen who have maritime tort claims against the defendants on similar facts.

During the pendency of the action in the trial court, this Honorable Court decided the case of Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 101 S. Ct. 2615 (1981)(hereinafter National Sea Clammers). The defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Fed. R. Civ. P. Rule 12(b)(6), citing the National Sea Clammers decision. The trial court granted the motion to dismiss, holding that pollution of navigable waters was comprehensively regulated by the Federal Water Pollution Control Act, 33 U.S.C. Section 1251 et seq., and the Marine Protection, Research and Sanctuaries Act, 33

U.S.C. Section 1401 et seq., and that all nonstatutory causes of action by private victims against marine polluters, including maritime tort actions, had been thereby preempted, citing as its authority this Honorable Court's opinion in National Sea Clammers.

Plaintiffs timely appealed to the United States Court of Appeals for the First Circuit, claiming that the district court had misinterpreted this Honorable Court's holding in National Sea Clammers. The Court of Appeals, characterizing the plaintiffs' claim as one based on nuisance, albeit in maritime tort, held that the FWPCA and MPRSA preempted all "federal judge-made law" on the subject, including both maritime and non-maritime nuisance claims in the area of water pollution, and affirmed the holding of the district court.

Plaintiffs timely filed a petition for rehearing, citing this Honorable Court's

opinion in Silkwood, Adm'r. v. Kerr-McGee Corp., ___ U.S. ___ ,104 S. Ct. 615 (1984), which was decided after briefs and oral argument had been submitted to the Court of Appeals. Plaintiffs argued for rehearing on the ground that a finding of comprehensive preemption should not be made where the cited federal statutes only provided for the regulation of standards for discharge of toxic wastes and for limited federal recovery of cleanup costs .

On April 25, 1984, the Court of Appeals for the First Circuit denied plaintiffs' petition for rehearing.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the United States District Court for the District of Massachusetts was invoked on the basis of Article III, Section 2 of the U. S. Constitution, and Title 28, U.S. Code, Section 1333. The plaintiffs' claims were stated solely as causes of action under federal admiralty law and characterized as maritime tort claims. Diversity of citizenship was lacking, so there was no concurrent jurisdiction of the court under Title 28, U.S. Code, Section 1332.

A R G U M E N T

I.

The Rulings Below Were Believed To Conform To Existing Law Established By The National Sea Clammers Decision; Not To Create New Theories Of Law For This Case

The lower courts in this case held that private victims of water pollution caused by private polluters have no legal remedies available to them in federal or state courts for their direct damages, because the Federal Water Pollution Control Act (hereinafter FWPCA), 33 U.S. Code 1251 et seq, and the Marine Protection, Research and Santuaries Act (hereinafter MPRSA), 33 U.S. Code 1401, et seq., have preempted "all federal judge-made law of nuisance whether maritime or general federal law."

The basis for the lower courts' holdings is the opinion handed down in National Sea Clammers by this Honorable Court. It is respectfully submitted that the courts below misunderstood the scope of the opinion of

this Honorable Court and failed to take into account the foreseeably adverse consequences of their rulings. If the legal precedents created by the opinions below are not reversed, the adverse effects on victims of water pollution will be pervasive and substantial.

The rulings of the courts below are predicated upon their belief that this Honorable Court in National Sea Clammers proclaimed three compelling legal propositions; two having the potential of leaving victims of deliberate, widespread harm without a remedy, and the third having the potential of causing extensive procedural confusion in the federal district courts, as follows:

1) Private polluters may discharge and dump toxic wastes into public waters and may even immerse private victims in toxic wastes, severely injuring them in their persons and in their property, and for such injuries those victims may have no legal remedy in

federal or state courts against the polluters.

2) The FWPCA operates to set a preemptive federal limit on the economic incentives and sanctions that may be imposed on private polluters to control their own toxic discharges. Under the Act, polluters have no motivation to prevent or to clean up the pollution they generate, since (a) they are not vulnerable to any economic pressure in the form of legal liability to direct victims of their actions, and (b) they are subject only to limited liability to the government for the costs of cleaning up all of the pollution that they create. As long as the limited maximum amount of statutory clean-up costs that are assessable against them by the federal government are less than the costs of eliminating the pollution that they cause, and as long as they can derive more profits by continuing to extend their water polluting activities within their permits, it makes no legal or economic sense

for water polluters to reduce or eliminate any part of pollution that they generate, no matter how large. In fact, it makes more economic sense for them to maximize their activities, even though they cause extensive pollution thereby, because they will be able to spread over more of their work product the limited clean-up costs that can be imposed by the government.

3) The doctrine of statutory preemption now nullifies any and all of the jurisdictional distinctions of the federal Judicial Power subject matter jurisdiction stated in Constitution Article III, Section 2, and in Title 28 of the U.S. Code. Any federal statute that preempts federal common law in cases that fall exclusively within the subject matter jurisdiction of the district courts under Title 28, U.S. Code, Section 1331, equally preempts judge-decided federal admiralty and maritime law in admiralty cases that fall exclusively within the subject matter jurisdiction of the district

courts under Title 28, U.S. Code 1333. [Whether an admiralty law statute that preempts general (i.e., "judge-made") maritime law also preempts federal common law that falls under the same topic is not yet clear.]

The petitioners represent to this Honorable Court that they believe that the foregoing propositions are the essence of the lower courts' holdings in this case. The ramifications of those propositions are obviously far-reaching. What is more important to note, however, is that the lower courts did not intend to create any new legal theories in order to arrive at those three propositions. They simply stated that they were conforming to what they believed this Honorable Court declared in National Sea Clammers. This present petition, therefore, really does not seek to contest the validity of new propositions of law created by the lower courts. Instead, this petition asks whether this Honorable

Court meant to have its opinion in National Sea Clammers thus interpreted by the courts below. Because of the enormous potential impact of the lower court rulings, petitioners believe that a writ of certiorari should be granted in this case.

II.

It Is Important That This Court Should Rule That The FWPCA And Similar Statutes Do Not Exonerate Polluters From Claims Of Direct Victims

The petitioners suggest that, for the purposes of the within petition, the FWPCA and MPRSA can be characterized as federal legislation that was intended to set basic standards by which clean public waters can be achieved throughout the nation. The acts empower administrative agencies by a permit process to limit the amount and kind of toxic wastes that may be discharged into public waters by private polluters. The FWPCA also empowers the federal government to a limited extent to sue for and collect from private polluters the federal costs of

cleaning up pollution in public waters generated by them.

Reading the National Sea Clammers case to be applicable and compelling, the lower courts declared that because the FWPCA and MPRSA provided for legal standards for polluting discharges and empowered the federal government to recover clean-up costs up to a limited maximum amount, the preemption of the two statutes must be regarded as pervasive and complete in respect to any claim that falls within the topic of water pollution. Accordingly, they ruled that private victims of such pollution now have no remedy for the direct damage done to them by any water pollution for which the federal government may recover clean-up costs.

With respect, it is suggested that the courts below extended beyond reason the doctrine of preemption as applied in the National Sea Clammers case. A preferred view of the FWPCA and related acts should be

that they establish a frame of reference for the withholding of criminal sanctions in respect to toxic discharges into waters subject to the acts. A polluter's formal application for a permit to discharge is a disclosure and a promise that toxic discharges will not exceed a specific kind and level. The permit serves as a governmental declaration that if an applicant's toxic waste discharges do not exceed the kind and amount specified, the polluter will not be charged with criminal violation of the acts. The purposes of the acts are served and a polluter is assured that if he remains within the limits thus set, he need not fear criminal prosecution. Nothing in such a permit process is aimed at dealing with the rights of victims, since polluters do not as part of an application disclose who will or may be directly victimized by their toxic discharges. In fact, it is arguable that most polluters will not even know who may become a victim

of their toxic discharges. For example, if the toxic PCB wastes of the polluters in the present case have found their way into the underground fresh water tables of the surrounding communities of New Bedford and Fairhaven, a substantial number of persons who are served by wells on their property may have consumed large quantities of PCBs and are victims of the polluters' activities. If the permit process is intended to give a carte blanche to polluters to destroy their neighbors' drinking water supplies with impunity, the process is a vicious form of free enterprise that petitioners have assumed to be long dead. Such a version of the permit process is hardly regulatory; it is truly permissive! Petitioners ask this Honorable Court to take judicial notice of the fact that permits now issued by governmental agencies do not purport to exonerate permittees from civil liability to those injured by their actions, which would be the

case if total exoneration were to be accomplished by the acts. [For an example of this, see a copy of a permit issued to one of the polluters in the present case, at Part II, B6, B8, and B9 of the permit, found at Appendix A34, at A40 and A41, below.]

If their opinions are not overruled, the effect of the opinions and judgments of the courts below in this case will be to impose a heavy burden on direct victims of pollution and to offer to polluters new opportunities to create mischief and confusion. Moreover, if the lower courts' reading of this Honorable Court's holding in National Sea Clammers is correct, it seems to be inevitable that whatever progress has been made in cleaning up the waters of our nation will be lost. Since it is obvious that that cannot have been the purpose of Congress in enacting the FWPCA, it must necessarily follow that the lower courts' views are incorrect. A detailed analysis of the reasoning employed by the lower courts

is not necessary in order to reach such a conclusion. What is needed only is for this Honorable Court to consider whether its holding in National Sea Clammers was intended to have the effect given to it by the courts below.

III.

The National Sea Clammers Case Is Distinguishable On Its Facts, And Should Not Be A Precedent Here.

There are distinct differences between the factual and procedural elements of National Sea Clammers and the case now before this Honorable Court.

The petitioners herein brought an action for a money judgment remedy under the federal maritime law, pursuant to Title 28, U.S. Code, Section 1333. They are private victims suing for direct damages sustained by them from pollution generated by the defendants. No governmental agencies are parties to the present case. No legal challenge to any government action under the

FWPCA is involved in this case. No clean-up action or clean-up damages are sought by the petitioners. The petitioners made no claim as private attorneys-general, and no claim for damage to the public's interest in the fisheries was asserted. No remedy which is available under the FWPCA is being sought by the petitioners. The legal precedent for their cause of action is in maritime cases such as Burgess v. M/V TAMANO (D. Me, 1973) 370 F. Supp. 247; Louisiana v. M/V TESTBANK (ED. La, 1981) 524 F. Supp. 1170; U.S.v. Oswego Barge Corp. (CA2, 1981) 664 F.2d 327. See also Bay State Lobster Co., Inc. v. Perini Corp., 355 Mass. 782, 245 N.E. 2d 759 (1969). Other precedents are inherent in the limitation of liability proceedings brought pursuant to Title 46, U.S. Code 181 et seq., especially in massive oil spill cases, such as the M/V Torrey Canyon disaster in March 1967 --see TORREY CANYON Limitation Procs., (CA2, 1969) 409 F2d 1013; or the the IXTOC I disaster in the Gulf of

Mexico --see Drilling Unit SEDCO 135 Limitation Procs., (SD Tex, 1982) 543 F.Supp. 561; or the M/V Amoco Cadiz disaster of the coast of France --see AMOCO CADIZ, Limitation Procs., (CA7, 1983) 699 F2d 909. The petitioners' cause of action is not different from any oil or chemical spill damage case brought by a victim against water polluters.

In National Sea Clammers, the plaintiffs sought a remedy under the FWPCA and MPRSA, but claimed that they could come within the FWPCA under a theory of federal common law of nuisance. However, since the plaintiffs had failed to comply with the procedural requirements of the Federal Water Pollution Control Act, they could not claim a remedy under the FWPCA. Furthermore, since the plaintiffs had not complied with the procedural requirements of the Federal Tort Claims Act, Title 28, U.S. Code, Section 1346, or of any applicable state tort claims act, they could not seek a remedy pursuant

to federal maritime law against the defendant government agencies in that case. This Honorable Court expressly noted in National Sea Clammers that the plaintiffs had asserted no claims under the federal admiralty and maritime laws in the court of first resort. Also, in National Sea Clammers, the plaintiffs apparently sought damages for the loss of a public resource, as opposed to their own personal damages. Their case was more in the nature of a private attorneys general suit to recover damages suffered by the public; although it is not clear to the petitioners herein exactly what the plaintiffs in National Sea Clammers expected would be the manner of collection and distribution of damages in the event that the plaintiffs prevailed in that case, since any judgments against the defendant public agencies in favor of the public interest would be both payable from and back to public treasuries.

In National Sea Clammers, it appears that

the plaintiffs ignored clearly safe courses through the well-marked procedural channels of the FWPCA and federal/state tort claims acts, and attempted to sail their case in uncharted areas which were demarcated as being within the domain of the federal common law of nuisance. In so doing, they ignored the admonition that when the depth of the water is exceeded by the draft of one's boat, one is aground. They were not capsized by contrary winds of maritime law, nor did their cause founder upon any doctrinal reefs of the FWPCA or of the federal/state tort claims acts. Their case was lost when the plaintiffs failed to recognize that the laws of the shore serve needs that are different from those of the sea. As a result, they navigated by landmarks that were located well within the inland territory of the common law, and drove themselves hard upon a rocky beach where natural forces destroyed them.

Had the plaintiffs in National Sea Clammers

sought a remedy under the FWPCA or under federal maritime law pursuant to the federal/state tort claims acts, it may well be that this Honorable Court would have dealt less summarily with the claims made by them. The petitioners do not here contend that this Court was in error or unreasonable in disposing of National Sea Clammers on the grounds stated. To the contrary, petitioners respectfully acknowledge the correctness of the judgment of this Court in that case. Clearly, in National Sea Clammers, the plaintiffs sought relief under a far-fetched theory, while they ignored obvious remedies and legal precedents that were readily available to them under the FWPCA and under federal maritime law. The petitioners' only contention here is that in deciding the National Sea Clammers case, this Honorable Court's opinion was stated in terms that have been misinterpreted by the lower courts in cases involving maritime claims of private water pollution victims

against private polluters, and there is an urgent need for clarification of the National Sea Clammers holding in order to prevent further misinterpretation with all of the foreseeably adverse consequences thereof.

For the foregoing reasons, it is respectfully submitted that National Sea Clammers should not be treated as a precedent and should not be deemed to be dispositive of the issues in the present case before this Court, and that this Honorable Court should grant a writ of certiorari herein in order to make a ruling to that effect to guide the lower courts.

IV.

Federal Admiralty And Maritime Jurisprudence Is A Separate Constitutional Jurisprudence Apart From Federal Common Law

Even in the formative years of the law, the need for different rules to govern land matters and maritime issues was always recognized. In his Corpus Juris Civilis,

the Emperor Justinian declared:

"Ego orbis terrarum dominus sum, lex autem maris. Lege Rhodia de re nautica iudicetur, quatenus nulla lex ex nostris ei contraria est." (Digest 14.2.9.)

The need to preserve the separate status of admiralty and maritime law was recognized in the Constitution, Article III, Section 2. In the formative years of admiralty jurisprudence in the United States, in the landmark case of DeLovio v. Boit, 2 Gall. 298, Fed Cas. No. 3,776 (CCD Mass. 1815), Judge Story discussed the ancient history of this separate jurisprudence. In this century, Justice Holmes, in U.S. v. F.G. Evans (The Blackheath), 195 U.S. 361, 365 (1904) made clear that the grant of admiralty jursdiction in Article III, Section 2, of the Constitution is fixed in scope by the Constitution and cannot be enlarged by statute. In current times, this Honorable Court has continued to recognize the status of the admiralty and maritime

jurisprudence as separate and distinct under the Constitution. Foremost Ins. Co. v. Richardson, 457 U.S. ___, 103 S.Ct 198(1982).

In Romero v. International Terminal Co., 358 U.S. 354 (1959), at 364-368, 370, Justice Frankfurter pointed out that the Framers of the Constitution used precise, differentiating and not redundant language, and that "cases in admiralty" within the scope of Title 28, U.S. Code, Section 1333, are not of the same class as "cases arising under the laws and Constitution of the United States," within the scope of Title 28, U.S. Code, Section 1331.

The courts below in this case have declared that cases of "judge-made" federal common law are of the same class as cases of "judge-made" admiralty law, and that there is no distinction to be made between them. If that is true, the language of Title 28, U.S. Code, Sections 1331 and 1333 must be

regarded as redundant, notwithstanding Justice Frankfurter's views of the Constitution. It must be equally true that federal courts of first resort asserting jurisdiction in admiralty cases involving "judge-made law" may do so under the provisions of Title 28, U.S. Code, Section 1331, without regard to the grant of subject-matter jurisdiction in Section 1333. And it must also follow that the right of a jury trial, which is not ordinarily available under the general maritime law in cases filed pursuant to Title 28, U.S. Code, Section 1333, will now be available in all admiralty cases that are filed pursuant to Title 28, U.S. Code, Section 1331.

The courts below did not deal with the obvious permutations of their ruling that all "judge-made law" cases are the same. For example, the effect of Title 28, U.S. Code, Section 1332, which includes a wide variety of civil "judge-made law" cases within its scope, becomes uncertain. If a

suit involving a civil claim arising under this Court's interpretation of the Constitution is filed in a federal district court, does the happenstance that the litigants are citizens of different states make Section 1332 concurrently applicable and impose a $10,000 minimum damages limitation on the subject matter jurisdiction of the district court?

Another problem could involve the application of Title 28, U.S. Code, Sections 1923 and 1925, which deal with docket fees and costs of briefs, as well as the allowance and taxation of costs in admiralty cases. If admiralty cases involving "judge-made law" are the same as cases arising under Title 28, U.S. Code 1331, then there are no cases that can be categorized as being admiralty cases for purposes of Sections 1923 and 1925.

The lower courts' ruling in this case create a number of other paradoxes and sources of

confusion in the field of admiralty claims, which need not be elaborated upon in this petition but which will be obvious to this Honorable Court. The petitioners respectfully submit that similar paradoxes and confusion may plague the lower courts in non-admiralty claims in other federal "judge-made law" fields if the rulings of the courts below in the present case are not reversed. For those reasons, too, a writ of certiorari should be granted herein.

V.

Reversal Of The Rulings Below Will Have No Adverse Impact On the FWPCA And Will Not Be Inconsistent With This Court's Holding In National Sea Clammers

The effect of the rulings below has been to create a radical departure from historic principles of substantive and procedural law, which undoubtedly will have a major adverse economic impact upon victims who have already been physically and psychologically traumatized by the impact of water pollution. A reversal of the rulings

below will simply restore the status quo in which victims of water pollution have the right to sue polluters for the damage they have suffered. The purposes and operation of the FWPCA and MPRSA will not be affected in any way. In fact, those acts and all similar legislation will be supplemented by the economic effect of victims' civil suits for pollution damage, which will force the polluters to internalize the costs of their pollution, despite their immunity to criminal prosecution for pollution within permitted limits.

A reversal of the rulings below will not be inconsistent with this Honorable Court's opinion in National Sea Clammers, since the way will still be closed to private attorneys general suits that do not comply with the statutory procedural requirements of the FWPCA or federal/state tort claims acts and that are not suits within the traditional admiralty and maritime jurisdiction of the federal courts or within

the traditional common and statutory law jurisdiction of the state courts. For example, pollution damage to private or public drinking water resources is not damage that pertains to traditional maritime activity. Thus, a maritime cause of action will not lie for such damage, and no forum for such an action will be available in a federal district court under Title 28, U.S. Code, Section 1333. Similarly, by virtue of National Sea Clammers, a federal common law cause of action will not be available in a federal district court under Title 28, U.S. Code, Section 1331, because of this Court's ruling in National Sea Clammers that Congress by the FWPCA preempted federal common law remedies for water pollution. However, under the qualifying opinion of this Honorable Court in Silkwood, Adm'r v. Kerr-McGee Corporation, ___ U.S. ___, 104 S.Ct 615 (984), the holding in National Sea Clammers can be read as saying the the FWPCA preempted only federal common law remedies

of pollution victims, but did not preempt any traditional federal admiralty or state statutory or common law remedies of such victims. Thus, a state common law action will still exist for such water pollution damage, and a state forum will be available under state law, with a federal forum available under Title 28, U.S. Code, Section 1332, in diversity cases, without doing any violence to the purposes or application of the FWPCA or to the holding of National Sea Clammers. Therefore, once again, the petitioners respectfully submit that a writ of certiorari should be granted and the rulings below should be reversed.

VI.

This Petition Is One In Which Summary Action Is Warranted To Reverse The Judgments Below

As is argued above, the overall question that is being presented to this Honorable Court is whether the Court meant to have its opinion in National Sea Clammers interpreted in the manner adopted by the lower courts in

this case. Did this Court intend to hold that substantive rights of private victims of private polluters were taken away by Congress by means of the FWPCA?

This Court knows what it intended to say in National Sea Clammers, and does not need to have National Sea Clammers reargued in order to be able to clarify its opinion. If this Court is inclined to declare that it did not intend to have its opinion in National Sea Clammers interpreted to equate federal common law and federal admiralty and maritime law or to treat them as being one and the same thing, then it appears that the within cause is ripe for summary action to reverse the judgments below.

If there has been no preemption of victims' rights to a maritime tort cause of action and money judgment remedy under federal admiralty and maritime law and/or to any state statutory or common law right and remedy concurrently available, then there

are existing noncontroversial doctrines of federal admiralty law and Massachusetts common law, such as are described in Burgess v. M/V TAMANO, supra, and in Bay State Lobster Co., Inc. v. Perini Corp., supra, which upon the facts of the within case entitle the several plaintiffs to prevail individually and in their class action on the issue of liability.

What is before this Honorable Court is a case which, except for the apparent interdictive effect of the lower courts' interpretation of National Sea Clammers, would not have been subject to dismissal for failure to state a cause of action for which relief may be granted. If this Court declares that no such interdiction of victims' rights was intended, no further grounds are needed by this Honorable Court in order for it to be able to reverse and remand for reinstatement and further proceedings in the district court.

Petitioners respectfully suggest that it would be presumptuous for them or for the respondents to brief and to argue to this Honorable Court what its intentions were in National Sea Clammers. Clarification of the Court's opinion is needed, because, without clarification, widespread confusion and harm may occur. But that clarification may well be provided, if the Court sees fit, by a summary opinion which removes the apparent interdiction of the petitioners' cause of action in the district court. By taking summary action, the Court will save time and reduce its own heavy burdens, and will allow the petitioners' cause of action to proceed expeditiously, so that they may obtain the remedies they so sorely need.

Respectfully submitted,
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MEMORANDUM AND ORDER

February 1, 1983

SKINNER, D. J.

Plaintiffs, licensed commercial lobstermen, shellfishermen and fishermen, and the Massachusetts Lobstermen's Assoc. Inc., bring this action for damages against defendants Aerovox, Inc. ("Aerovox") and Cornell-dubilier Electric Corp., Inc. ("CDE") alleging that the defendants have deprived plaintiffs of their trade by discharging toxic chemicals into the waters, contaminating the shellfish, and causing the waters to be closed to commercial fishing. The case is presently before the court on defendants' motion to dismiss pursuant to Fed.R.Civ.P 12(b)6.

Pollution of navigable waters has been addressed by Congress in the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. Section 1251 and by the Marine Protection Research, and Sanctuaries Act of 1972 (MPRSA"), 33 U.S.C. Section 1401 (1976

ed. and Supp. III). In Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981), the United States Supreme Court held that FWPCA and MPRSA (1) provide no private right of action for damages, and (2) preempt the federal common law of nuisance in water pollution cases. Plaintiffs have framed their claims as maritime torts, thus seeking to avoid the precise holding of Sea Clammers. The Court in Sea Clammers based its decision of what is perceived to be the intent of Congress "to establish an all-encompassing program of water pollution regulation." Milwaukee v. Illinois, 451 U.S. 304, 318 (1981). There is no perceptable reason to distinguish between common law claims and maritime torts in construing the "all-encompassing" and preemptive effect of the statutes. Accordingly, defendants' motion to dismiss is ALLOWED.

/s/ Walter Jay Skinner
/s/ United States District Judge

FAIRCHILD, Senior Circuit Judge.

Plaintiffs, licensed commercial lobstermen, shellfishermen, and fishermen, and the Massachusetts Lobstermen's Association, Inc. [fn1] appeal from a judgment dismissing their maritime tort claim for alleged damage to fishing grounds caused by discharges of toxic substance. [fn2] Relying on Supreme Court decisions in Milwaukee v. Illinois, 451 U.S. 304 (1981) (Milwaukee County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) (Sea Clammers), the district court concluded that maritime tort claims for damages resulting from water pollution, based on a nuisance theory, have been, like federal common-law nuisance claims for such damages, preempted by enactment of the Federal Water Pollution Control Act (FWPCA), [fn3] 33 U.S.C. Section 1251 et seq., and the Maritime Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. Section 1401 set seq. For the reasons that follow, we affirm.

I.

Plaintiffs allege in their complaint that defendants Aerovox, Inc. and Cornell-Dubilier Electrical Corporation discharged "substantial quantities of toxic chemicals, heavy metals and other pollutants, including quantities of . . . polychlorinated biphenyls (PCBs), "into the Acushnet River, New Bedford Harbor, and Buzzards Bay in southern Massachusetts; that these pollutants settled on the seabed and have accumulated in high concentration in shellfish and bottom-feeding fish prompting the Massachusetts Department of Public Health to restrict commercial fishing in those areas; and that these restrictions have forced plaintiffs to fish in more remote, hazardous waters increasing their risks and costs while reducing the size of their catch. Plaintiffs brought suit invoking admiralty and maritime jurisdiction

and claiming damages from defendants' discharges to be at least $20,000,000.00.

Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted.[fn4] Defendants contended that discharges of pollutants into interstate and coastal waters are regulated under FWPCA and MPRSA, and, consistent with Milwaukee II and Sea Clammers, not properly the subject of maritime law damage claims based on public nuisance principles.

In reply to defendant's motion to dismiss, plaintiffs conceded that FWPCA and MPRSA preempted the federal common law of nuisance in water pollution cases, but contended a claim for damages under federal maritime law survived enactment of the statutes. The district court disagreed. The court found "no perceptible reason to distinguish between common law claims and maritime torts in construing the . . .

preemptive effect of [FWPCA and MPRSA].

As argued by the parties, we are presented with the same narrow issue addressed by the district court: whether maritime law is preempted by enactment of FWPCA and MPRSA to the extent it would afford a damage remedy for pollution of navigable waters based on a common-law nuisance theory.

II.

In Milwaukee II, the Supreme Court considered a suit by the State of Illinois to enjoin various Wisconsin municipalities and county sewerage commissions with respect to discharges of sewage into Lake Michigan. Suit was based on the federal common law of nuisance recognized by the Court in Illinois v. Milwaukee, 406 U.S. 91 (1972) (Milwaukee I), as controlling water pollution disputes interstate in character. When Milwaukee I was decided, the Court acknowledged that

"new federal laws and new federal regulations may in time preempt the file of federal common law of nuisance." 406 U.S. at 107. Five months later Congress passed the Federal Water Pollution Control Act Amendments of 1972 (the 1972 Amendments), 86 Stat. 816.

In deciding whether this enactment preempted the federal common law of nuisance, upon the basis of which an injunction had been granted to Illinois, the Milwaukee II Court emphasized the paramount nature of the authority of Congress with respect to common law. "Federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 314 (citation omitted). One of the principal decisions relied on by the Court for this proposition

was Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), a case involving a claim for damages under admiralty law.

> In [Mobil Oil], the Court refused to provide damages for "loss of society" under the general maritime law when Congress had not provided such damages in the Death on the High Seas Act:
>
> > "We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitation period, contributory negligence, survival, and damages... The Act does not address every issue of wrongful-death law, ... but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."
>
> Id., at 625.
>
> Thus the question was whether the legislative scheme "spoke directly to a question" -- in that case the question of damages -- not whether Congress had affirmatively proscribed the use of federal common law.

451 .S. at 315.

With this question in mind, the Court concluded the 1972 amendments supplanted federal common law, at least as a source of restrictions on discharges of sewage. The Court found that Congress had "occupied the field" of water pollution abatement "through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Id. at 317.

Milwaukee II might have been read to hold no more than that FWPCA preempts the authority of a district court to impose under federal common law or nuisance more stringent limitations on effluents than those promulgate by EPA under the Act. But the Supreme Court made clear in Sea Clammers that this is too narrow a reading of the Milwaukee II decision.

Sea Clammers presented the Supreme Court with a factual setting quite like that

of the present case. Plaintiffs, an organization whose members harvest fish and shellfish off the coast of New York and New Jersey and one of its members, brought suit in federal district court alleging that defendants' discharge of sewage into the Hudson River and New York Harbor was polluting the Atlantic Ocean and causing the "collapse of the fishing, clamming and lobster industries which operate in [those] waters."[fn5] 453 U.S. at 5. Among other legal theories, plaintiffs sought injunctive and declaratory relief and damages through implied rights of action under FWPCA and MPRSA, in federal common law of nuisance, and in maritime tort.

The district court rejected each of these claims. In particular, the court refused to imply remedies not provided under the Acts, rejected the common law of nuisance claim as unavailable to private parties, and found that the maritime claim

had been inadequately pled. The Third Circuit reversed, upholding all three bases for suit. See National Sea Clammers Assn. v. City of New York, 616 F.2d 1222 (3rd Cir. 1980). The Supreme Court made a limited grant of certiorari.

The Court rejected the possible existence of an implied right of action under the Acts. As to the question of a common law nuisance claim, the Court explained that Milwaukee II held "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA, which was completely revised soon after the decision in [Milwaukee I]" 453 U.S. at 21-22. The Court stated that Milwaukee II

> disposes entirely of respondents federal common law claims, since there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue. To the extent that this litigation involves ocean waters not covered

> by the FWPCA, and regulated under the MPRSA, we see no cause for different treatment of the pre-emption question. The regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean dumping, than are analogous provisions of the FWPCA.

Id. See Marquez-Colon v. Reagan, 668 F.2d 611, 614 n.2 (1st Cir. 1981) ("the Supreme Court . . . held [in Milwaukee II and Sea Clammers] that the federal common law of nuisance for interstate and coastal water pollution has been entirely preempted by [FWPCA]").

III.

The plaintiffs concede the discharges alleged in their complaint occurred in waters subject to regulation under FWPCA or MPRSA, and that claims for injunctive and compensatory relief from those discharges can no longer be based on the Milwaukee I federal common law of nuisance. The plaintiffs seek recovery as a matter of maritime tort law, the elements of

the claim being the same as common-law nuisance.[fn6] The principles of commonlaw nuisance on which they rely have recently been recognized as principles of maritime tort law. See Burgess v. M/V Tamano, 370 F. .Supp. 247 (D. Maine 1973) (recognizing right of commercial fishermen to maintain suit for damages against parties allegedly responsible for oil spillage into Maine's coastal waters). See also Matter of Oswego Barge Corp., 664 F.2d 327, 334 n.11 (2nd Cir. 1981) (discussing uncertain existence of a maritime claim based on nuisance principles). Arguing that the maritime tort claim was not specifically addressed by the Supreme Court in Sea Clammers, plaintiffs contend that the underlying maritime law was not preempted. We cannot agree.

In Sea Clammers, the Third Circuit upheld common-law nuisance claims sounding in both general federal law and admiralty. 616 F.2d at 1233-36. Petitions for a writ

of certiorari were filed by a group of New Jersey sewerage authorities, No. 79-1711, 49 U.S.L.W. 3110 (Apr. 29, 1980), by the Joint Meeting of Essex and Union Counties in Jew Jersey, No. 79-1754, 49 U.S.L.W. 3110 (May 5, 1980), by the City and Mayor of New York, No. 79-1760, 49 U.S.L.W. 3111 (Ma 5, 1980), and by the federal defendants named in the suit, No. 80-12, 49 U.S.L.W. 3111 (May 5, 1980), and by the federal defendants named in the suit, No. 80-12, 49 U.S.L.W. 3139 (July 3, 1980). The New Jersey sewerage authorities and the City and Mayor of New York expressly asked in their petitions that the Court consider whether a nuisance claim for damage from water pollution may be maintained in maritime tort law under 28 U.S.C. Sec. 1333 or in general federal law under 28 U.S.C. Section 1331. The Supreme Court limited its grant of certiorari to consideration:

> 1. Whether [FWPCA and MPRSA] imply a private right of action

> independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. Section 1415(g).
>
> 2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. Section 1331.
>
> 3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by [FWPCA and MPRSA].

EPA v. Sea Clammers, 449 U.S. 917-18 (1980).

We are uncertain whether the Court's limited grant of certiorari included consideration of the viability of a commonlaw nuisance claim sounding in admiralty under 28 U.S.C. Section 1333. The Court understandably limited question number two, whether a private citizen has standing to maintain common-law nuisance claim for

damages, to actions brought as a general federal question under Section 1331. Presumably there would be no question of standing to maintain an otherwise appropriate maritime claim. It turned out to be unnecessary to address question two.

Question three, which the Court did address, was ot expressly limited to actions under Section 1331. Whether in framing question three the Court intended to include consideration of preemption of a maritime action under Section 1333 based on common-law nuisance principles is problematic. The elements and principles of the cause of action for public nuisance are probably the same whether general federal or maritime law is invoked. See Clammers opinion whether it was solely considering federal common-law nuisance in an action invoking Section 1331 federal question jurisdiction, although the opinion refers to consideration by the lower courts of the

maritime tort claim. Given the extension of admiralty jurisdiction to all wrongs occurring on navigable water, see Foremost Insurance Co. v. Richardson, 457 U.S. 668, 672-77 (1972), not reaching the question of the viability of a nuisance claim in maritime tort would mean the Court left unconsidered a basis for recovery virtually coextensive with the claim rejected.

In Oswego Barge, the second Circuit concluded "the Supreme Court could well have understood that by determining that the FWPCA preempts the federal common law of nuisance, the Court was in effect rejecting both the common law claim based on Section 1331 jurisdiction as well as the maritime claim based on Section 1333 jurisdiction. The Court was not reviewing the maritime claim as such, but it was nonetheless finding its sole component to have been preempted." 44 F.2d at 338 n.13.

IV

Assuming that the Supreme Court did not decide whether the Sea Clammers plaintiffs could pursue their maritime tort claim, we address the question whether there is any reason why a maritime damage claim founded on principles of common-law nuisance should survive the enactment of FWPCA and MPRSA when a damage claim founded on identical principles, embodied in the federal common law of nuisance, did not survive.

The district judge found no perceptible reason o distinguish between the two claims in this regard.

We can find none.

In Oswego Barge, the Second Circuit considered a maritime tort claim founded on principles of common-law nuisance and found

preemption, albeit in a different situation.

There the United States was plaintiff and sued a barge owner for the cost of cleaning up an oil spill. FWPCA gave the United States a statutory cause of action, but limited the recovery. 33 U.S.C. Section 1321(f). The government sought full recovery on a maritime tort nuisance theory. The district court entered jugment against the government and the court of appeals affirmed as to this claim.

Judge Newman wrote a very scholarly opinion dealing with preemption by congressional act of judge-made federal law. He acknowledged a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject. 64 F.2d at 335-36. Noting that the Supreme Court appears to have applied the presumption somewhat less forcefully to judge-made maritime law than

to non-maritime federal common law, id. at 336, he nevertheless concluded that the presumption arose in the case under consideration and was not rebutted.

The question of whether non-statutory maritime law survived enactment of FWPCA ultimately turned in Oswego Barge on

> a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. The "scope of the legislation" must be assessed. City of Milwaukee v. Illinois, supra, 101 S.Ct. at 1791 n.8. A judgment must be made whether applying judge-made law would entail "filling a gap left by Congress' silence" or "rewriting rules that Congress has affirmatively and specifically enacted." Mobil Oil Corp. v. Higginbotham, supra, 436 U.S. at 625. The detail and

> comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of long-established and familiar principles" of "the common law or the general maritime law." Isbrandsten Co. v. Johnson, 343 U.S. 779, 783 (1952).

Id. at 338-39 (footnotes omitted).

We acknowledge that FWPCA contains provisions dealing more specifically with the concerns of the Oswego Barge plaintiffs than with the concerns of the plaintiffs in the case before us. As Judge Newman wrote, FWPCA established for the situation of an oil spill "a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct." Id. at 340. The act does not provide a compensatory remedy for losses of the type complained of here. It does authorize the government to remove hazardous substances discharged into navigable waters

and to recover at least part of the cost. 33 U.S.C. Section 1321(c)(1) and (f)(2).fn7] Present plaintiffs allege that the damage is irreversible, and the cleanup provisions may thus provide no relief.

The Supreme Court has emphasized, however, the comprehensiveness of the policy implemented in FWPCA rather than the adequacy of the implementation. "The lesson of Milwaukee II is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution." Illinois Outboard Marine, 680 F.2d 473, 478 (7th Cir. 1982). "The question is whether the field has been occupied, not whether it has been occupied in a particular manner."[fn8] Milwaukee II, 451 U.S. at 324.

In Milwaukee II, the Supreme Court found no provisions of FWPCA either

expressly preserving or preempting the federal common law of nuisance.[fn9] The court did find, however, that "[t]he 'major purpose' of the [1972] Amendments was 'to establish a comprehensive long-range policy for the elimination of water pollution.'" 451 U.S. at 318 (quoting S. Rep No. 92-414, at 95, 2d Leg. Hist. 1511) (emphasis supplied by Court), and that the provision of the Amendments "occupied the field" of water pollution abatement. Id. at 317. The Court concluded that "[t]he establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." Id. at 319. The Supreme Court readily rejected a claim for private damages in Sea Clammers because "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA," 453 U.S. at 22, and not because FWPCA "addressed some

aspect of the problem in a particular way." Outboard Marine, 680 F.2d at 478. "[T]he "question" Congress 'addressed' in the 1971 Amendments was the entire question of water pollution. The displacement of federal common law must, under the reasoning of Milwaukee II, be equally broad."Id.

An ordinary construction of the Supreme Court's pronouncement in Sea Clammers that "the federal common law of nuisance in the area of water pollution is entirely preempted" would appear to encompass all federal judge-made law of nuisance in the area of water pollution is entirely preempted" would appear to encompass all federal judge-made law of nuisance whether maritime or general federal law. We agree with the district court that for present purposes a claim for damages based on nuisance principles and brought as a claim of maritime tort is indistinguishable.

V

Plaintiffs argue that even if FWPCA's enactment preempted the federal common law of nuisance, the district court sitting in admiralty may borrow from state law to fashion a theory of liability for the instant dispute. There is no question that federal courts may borrow from a variety of sources in establishing common law admiralty rules to govern maritime law liability where deemed appropriate. See Wilburn Boat Co. v. Fireman's Ins. Co., 348 U.S. 310 (1954). But in our view the source of the borrowed law would be irrelevant. A damage claim based on common-law nuisance principles is precluded whether under maritime or other federal jurisdiction.fn10]

Accordingly, the district court's judgment dismissing plaintiffs' complaint for failing to state a claim upon which relief can be granted is AFFIRMED.

[fn1]The Massachusetts Lobstermen's Association, Inc. (MLA) is a not-for-profit association of lobstermen engaged in providing hull, protection and indemnity, and health and accident insurance to its members. The majority of MLA members operate in Massachusetts; MLA asserts that defendants' actions have increased the likelihood of claims against its insurance policies, injuring MLA and its members.

[fn2]The United States was allowed to submit a brief amicus curiae in support of reversal "as a shoreside and marine property owner."

[fn3]The Federal Water Pollution Control Act as originally enacted, 62 Stat. 1155, was held by the Supreme Court in Illinois v. City of Milwaukee (Milwaukee I), 406 U.S. 91 (1972), not to preclude an action under a federal common law of nuisance to enjoin the discharge of water pollutants. Only after passage of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, did the Court conclude in Milwaukee II that FWPCA had preempted the federal common law of nuisance. Accordingly, the district court references to FWPCA, and those in this opinion, are to the Act as amended in and since 1972.

[fn4]Defendants also moved to stay the proceedings pending resolution of a Massachusetts state court class action seeking injunctive and compensatory relief from Aerovox, Cornell-Dubilier, the City of New Bedford, and the Commission of the Department of Public Health for the Commonwealth of Massachusetts. Suit against defendants Aerovox and Cornell-dubilier was

based primarily on claims alleging negligence. The state suit was brought on behalf of "all fishermen living within the immediate vicinity of New Bedford, Massachusetts, New Bedford Harbor and southeastern Massachusetts area" who have suffered "past and present injuries . . . as a result of the contamination of [that] area." Nunes v. Aerovox, Civil Action No. 11445 (Bristol County S. Ct., complaint filed Oct. 10, 1980). As in the present federal complaint, Aerovox and Cornell-Dubilier were charged in state court with having discharged "dangerous chemicals and chemical waste, and more particularly PCBs, ... into the New Bedford Harbor and Buzzards Bay area." We take notice that the state court entered judgment for Aerovox and Cornell-Dubilier in early 1983, finding plaintiffs' claim based on negligence failed to show "physical damage which was directly caused by the defendants." Cross appeals were dismissed by stipulation of the parties on December 9, 1983.

[fn5]There are only two factual distinctions from the present case which might conceivably be relevant. One is that the active producing pollution and the waters polluted in Sea Clammers both involved two states; the polluting activity before us and the waters affected involve only the Commonwealth of Massachusetts. The other is that the Sea Clammers defendants were all public entities, but here the defendants are private corporations. We do not think these distinctions are a sound reason for a result different from that reached by the Court in Sea Clammers.

[fn6]The plaintiffs have not pressed a maritime tort under a negligence theory before this court. See Oswego, 664 F2d at

334, 343-44. We do not consider whether such a claim is appropriate where intentional discharge of pollution in the public waters is at issue, nor whether a negligence action for injuries due to water pollution still sounds in maritime tort after FWPCA's enactment.

[fn7]The United States points out that Section 1321 contains a provision specifically preserving the obligations of any owner or operator of any onshore facility to persons or agencies whose property is injured by discharge of a hazardous substance. Section 1321(o)(1) provides.

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

33 U.S.C. Section 1321(o)(1). The United States asserts as amicus that "[t]he manifest effect of this provision is clearly and affirmatively to preserve existing remedies for pollution-caused damage to property." (Government's emphasis.) In support of this proposition, the government refers us to numerous statements during the House of Representatives and Senate debates at the time Section 1321 was originally enacted as part of the Water Quality Improvement Act of 1970. among them are Senator Muskie's comment that "our bill does not go as far as the problem extends. We are not talking in our bill about liability

to third parties for damage from spills; "Hearings on S.7 and S.544 Before the Subcomm. on Air and Water Pollution of the Senate Public Works Comm., 91st Cong., 1st Sess., at 1369 (1969); and Representative Cramer's explanation that "charges or damages due to third parties under admiralty at or common law ... would be in addition" to charges for clean up costs under the Act. 116 Cong. Rec. 9326-27 (1970).

While Section 1321(o)(1) may be read expressly to preserve federal common law damage claims from preemption by the clean up provision itself, it cannot be read at this point to mean that the provisions of FWPCA as a whole do not preempt those claims. Section 1321(o)(1) states that "nothing in this section" shall affect the obligation of owners of discharging facilities. The section, and comments by Congressman in 1970, do not speak to the preempting effect of the 1972 Amendments. Milwaukee II and Sea Clammers plainly held that because of their comprehensive effect, the 1972 Amendments as a whole preempt the federal common law of nuisance. See discussion note 9 infra.

[fn8]Defendants contend that the restrictions placed on fishing in Buzzards Bay by Massachusetts health officials was prompted solely by concern with PCB contamination. In addition to being subject to general regulation of discharge under FWPCA, see 40 C.F.R. Part 122 (1983), the disposal of PCBs was singled out by Congress for regulation under the Toxic Substance Control Act (TSCA), 1 U.S.C. Section 2601 set seq. See 15 U.S.C. Section 2605(e); 40 C.F.R. Section 761.79 (1982).

[fn9]The plaintiffs rely, as did the Milwaukee II plaintiffs, on the preserving language contained within the citizen suit provision of FWPCA, 33 U.S.C. Section 1365. Section 1365 authorizes private civil suits to enforce an effluent standard or order issued under the Act. Section 1365(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

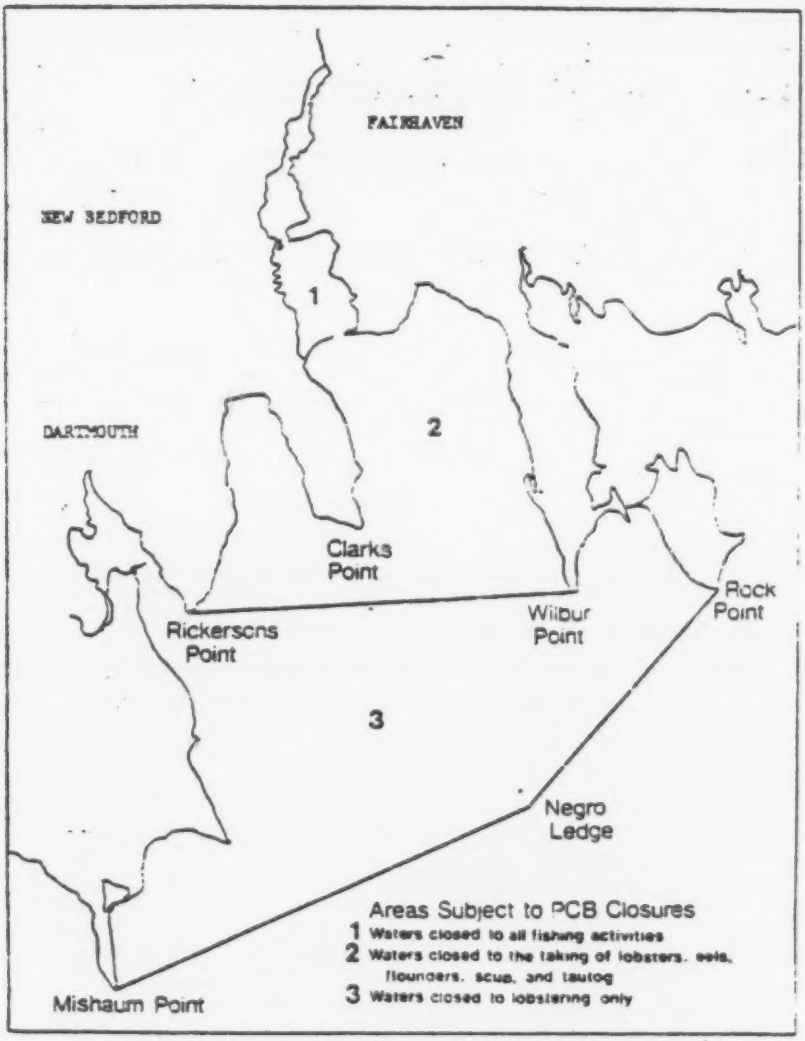
33 U.S.C. Section 1365(e). See also parallel provisions in MPRSA, 33 U.S.C. Section 1415(g)(5), and in TSCA, 15 U.S.C. Section 2620(b)(5).

The Supreme Court concluded this "subsection is common language accompanying citizen-suit provisions and ... means only that the provision of such suit does not revoke any remedies. it most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizens suits does not do so." Milwaukee II, 451 U.S. at 329.

[fn10]Plaintiffs have not contended that any part of their alleged injuries were suffered due to discharges prior to enactment of the 1972 Amendments. We therefore do not consider whether FWPCA displaces the federal common law of nuisance remedy for discharges of pollutants into navigable waters prior to 1972. See Outboard Marine, 680 F.2d at 476-81 (concluding that FWPCA displaced federal common-law nuisance claim for pre-1972 discharges).

EDITOR'S NOTE

PAGES A33 thru A-43 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.



Fishing Closure Areas established by the Massachusetts Department of Public Health.

RECEIVED

Federal Permit No. MA0003930
State Permit No. 451
State Application No. [illegible]
MODIFICATION #1

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et. seq; the "Act"), and the Massachusetts Clean Waters Act, as amended, (M.G.L.,C.21, §§26-53),

Cornell-Dubilier Electrical Corporation

is authorized to discharge from a facility located at

1605 East Rodney French Boulevard
New Bedford, MA 02744

to receiving waters named

Storm drain to the Fort Phoenix Reach

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit shall become effective on 45 days after the date of signature below.

This permit and the authorization to discharge shall expire at midnight, June 1, 1980.

This permit modifies the permit issued on August 14, 1975.

Signed this 31st day of December, 1976.

Leslie A. Carothers, Director
Enforcement Division
Environmental Protection Agency

Thomas C. McMahon, Director
Division of Water Pollution Control
Commonwealth of Massachusetts

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. During the period beginning effective date of permit and lasting through June 1, 1980 the permittee is authorized to discharge from outfall(s) serial number(s) 001

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations g/day (lbs/day)		Discharge Limitations Other Units (Specify)		Monitoring Requirements Measurement Frequency	Monitoring Requirements Sample Type
	Daily Avg	Daily Max	Daily Avg	Daily Max		
Flow-m^3/Day (GPD)	—	—	(100,000)	(125,000)	1 day/month	Estimate of total daily flow
Temperature (°F)	-	-	-	(90)	1 day/month	mean, max. of 4 grabs
Oil & Grease	-	-	-	15 mg/l	1 day/month	Average of 4 grabs
Polychlorinated biphenyls	.4.(.1)	.5.(.2)		.010 mg/l	1 day/month	Grab

*This shall not be achieved by dilution.

The pH shall not be less than 6.0 standard units nor greater than 8.5 standard units and shall be monitored monthly report range and average of 4 grabs

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

After all discharges enter sewer and above tidal effects. Otherwise sample component streams or report totals.

PART I

Page 2 of 8
Permit No. PA0003930
Corrected 1/16/77

A35

C. MONITORING AND REPORTING

1. *Representative Sampling*

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

2. *Reporting*

Monitoring results obtained during the previous 3 months shall be summarized for each month and reported on a Discharge Monitoring Report Form (EPA No. 3320-1), postmarked no later than the 28th day of the month following the completed reporting period. The first report is due on January 28, 1977* . Duplicate signed copies of these, and all other reports required herein, shall be submitted to the Regional Administrator and the State at the following addresses:

Environmental Protection Agency Region I - Permits Branch P. O. Box 8127 Boston, MA 02114	Division of Water Pollution Control Leverett Saltonstall Building 100 Cambridge Street Boston, MA 02202

*Subsequent reports due each April 28, July 28, October 28, and January 28.

3. *Definitions*

a. The "daily average" discharge means the total discharge by weight during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the daily average discharge shall be determined by the summation of all the measured daily discharges by weight divided by the number of days during the calendar month when the measurements were made.

b. The "daily maximum" discharge means the total discharge by weight during any calendar day.

4. *Test Procedures*

Test procedures for the analysis of pollutants shall conform to regulations published pursuant to Section 304(g) of the Act, under which such procedures may be required.

5. *Recording of Results*

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

6. *Additional Monitoring by Permittee*

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report Form (EPA No. 3320-1). Such increased frequency shall also be indicated.

7. *Records Retention*

All records and information resulting from the monitoring activities required by this permit including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Regional Administrator or the State water pollution control agency.

A. MANAGEMENT REQUIREMENTS

1. *Change in Discharge*

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, production increases, or process modifications which will result in new, different, or increased discharges of pollutants must be reported by submission of a new NPDES application or, if such changes will not violate the effluent limitations specified in this permit, by notice to the permit issuing authority of such changes. Following such notice, the permit may be modified to specify and limit any pollutants not previously limited.

2. *Noncompliance Notification*

If, for any reason, the permittee does not comply with or will be unable to comply with any daily maximum effluent limitation specified in this permit, the permittee shall provide the Regional Administrator and the State with the following information, in writing, within five (5) days of becoming aware of such condition:

a. A description of the discharge and cause of noncompliance; and

b. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the noncomplying discharge.

3. *Facilities Operation*

The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

4. *Adverse Impact*

The permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

5. *Bypassing*

Any diversion from or bypass of facilities necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. The permittee shall promptly notify the Regional Administrator and the State in writing of each such diversion or bypass.

6. *Removed Substances*

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

7. *Power Failures*

In order to maintain compliance with the effluent limitations and prohibitions of this permit, the permittee shall either:

a. In accordance with the Schedule of Compliance contained in Part I, provide an alternative power source sufficient to operate the wastewater control facilities;

or, if such alternative power source is not in existence, and no date for its implementation appears in Part I,

b. Halt, reduce or otherwise control production and/or all discharges upon the reduction, loss, or failure of the primary source of power to the wastewater control facilities.

B. RESPONSIBILITIES

1. *Right of Entry*

The permittee shall allow the head of the State water pollution control agency, the Regional Administrator, and/or their authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any discharge of pollutants.

2. *Transfer of Ownership or Control*

In the event of any change in control or ownership of facilities from which the authorized discharges emanate, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Regional Administrator and the State water pollution control agency.

3. *Availability of Reports*

Except for data determined to be confidential under Section 308 of the Act, all reports prepared in accordance with the terms of this permit shall be available for public

inspection at the offices of the State water pollution control agency and the Regional Administrator. As required by the Act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.

4. *Permit Modification*

After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

5. *Toxic Pollutants*

Notwithstanding Part II, B-4 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition and the permittee so notified.

6. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" (Part II, A-3) and "Power Failures" (Part II, A-7), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

7. *Oil and Hazardous Substance Liability*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

8. *State Laws*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.

9. *Property Rights*

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

10. *Severability*

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

PART III

OTHER REQUIREMENTS

FOR PURPOSES OF THIS PERMIT, THE FOLLOWING TERMS SHALL APPLY.

Daily Average - The value of a composite sample or the mean value of the analyses of the specified number of samples collected at regular intervals over a normal operating day.

Daily Maximum - The maximum value of any one grab sample collected in a normal operating day.

Grab Sample - An individual sample collected in a period of less than 15 minutes.

Composite Sample - A sample consisting of a minimum of eight grab samples collected at regular intervals over a normal operating day and combined proportional to flow, or a sample continuously collected proportional to flow over a normal operating day.

Implementation Schedule - An abatement program consisting of:

a. A plan of intended design, construction, and operation of new or modified facilities to treat the effluent; and

b. A timetable setting forth the dates by which all sources of water pollution must be in compliance with the effluent limitations of this permit. This schedule shall include (if appropriate) interim and final dates to accomplish:

(1) Completion of preliminary plans and engineering report
(2) Completion of final plans
(3) Contract award
(4) Commencement of construction
(5) Completion of construction and commencement of operation
(6) Attainment of operational level

The following abbreviations, when used, are defined below.

mg/l	milligrams per liter
ug/l	micrograms per liter
lbs/day	pounds per day
kg/day	kilograms per day
Temp. °C	temperature in degrees Centigrade
Temp. °F	temperature in degrees Fahrenheit
Turb.	turbidity measured in Jackson Candle Units (JTU)
oz/day	ounces per day
g/day	grams per day

TNFR or TSS	total nonfilterable residue or total suspended solids
BOD	five-day biochemical oxygen demand unless otherwise specified
TKN	total Kjeldahl nitrogen as nitrogen
NH_3-N	ammonia nitrogen as nitrogen
Total P	total phosphorus as phosphorus
COD	chemical oxygen demand
TOC	total organic carbon
Surfactant	surface-active agent
pH	a measure of the hydrogen ion concentration
PCB	polychlorinated biphenyl
m^3/Day	cubic meters per day
MGD	million gallons per day
Oil & Grease	hexane extractable material
Total Coliform	total coliform bacteria
Fecal Coliform	total fecal coliform bacteria
ml	milliliter(s)
ml/l	milliliter(s) per liter
SU	standard units
NO_3-N	nitrate nitrogen as nitrogen
NO_2-N	nitrite nitrogen as nitrogen
NO_2 & NO_3	combined nitrite and nitrate nitrogen as nitrogen
Cl_2	total residual chlorine